SEVEN SEAS INDUSTRIES SDN BHD

v.

PHILIPS ELECTRONIC SUPPLIES (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-22-319-1999]
18 JANUARY 2000

CIVIL PROCEDURE: *Injunction - Ex parte injunction - Ex parte injunction lapsed and set aside - Application for fresh injunction on inter partes basis - Whether required a separate written application - Whether ex parte application could be converted into inter partes application by court - Inter partes hearing fixed by court before expiry of 14-day period - Whether could be properly proceeded with - Rules of the High Court 1980, O. 29 rr. 1 and 2 - Scope and effect*

By way of encl 9 herein, the plaintiff applied for and obtained an *ex parte* injunction against the defendants. The *ex parte* injunction was later varied by the court upon the application of the defendants. Subsequently, the defendants applied by way of encl 25 to set aside the *ex parte* injunction. The plaintiff did not file a separate application for *inter partes* injunction upon the lapse of the *ex parte* injunction, and that being so the learned judge gave an order in terms of encl 25 and set aside the *ex parte* injunction.

Following the setting aside of the *ex parte* injunction, the plaintiff applied for a fresh injunction and in support thereof relied on encl 9. The defendants objected, arguing that encl 9 was a spent force and could not therefore be relied upon by the plaintiff. The defendants also argued that as a matter of procedural law, and pursuant to O. 29 rr. 1 and 2, Rules of the High Court 1980 ('RHC'), there must be a separate application made *inter partes* by the plaintiff for any further injunction. The issue was whether the plaintiff in the circumstances could again rely on encl 9 in order to obtain an injunction on an *inter partes* basis.

Held:

[1] It is now accepted as set law that O. 29 r. 1 (2B) RHC is a mandatory provision and that an *ex parte* injunction automatically lapses at the end of 14 days "unless sooner revoked or set aside". It was also ruled in *Kepong Industrial Park Sdn Bhd v. Teoh Seng Aun & 2 Ors* that any further injunction will have to be obtained by making a fresh application heard *inter partes.*

[2] Once the court has on its own motion granted an *inter partes* hearing date well before the expiry of the 14-day period, it means that notwithstanding the fact that the *ex parte* order would automatically expire after the 14 days or that the said order could be set aside, the *inter partes* hearing must go on on the date fixed or as extended. After all, the *ex parte* order stands only on the affidavit filed in support, whereas on the *inter partes* hearing date both sides would have filed their respective affidavits and the court will have the benefit of details and explanations not necessarily contained in the affidavit in support of the *ex parte* application.

[3] If the submission that encl 9 is jurisdictionally spent is to be accepted, it means that the plaintiff would have to merely refile and reserve the same application to make it *inter partes*. This clearly is not what the law intends. The purpose is achieved by converting the *ex parte* application into an *inter partes* application by the court thereby breathing life into it by giving the *inter partes* date.

[4] Order 29 r. 1(2) RHC does not say that a separate written application ought to be made. Whilst it was held in *Kepong Industrial Park* that a further injunction would have to be obtained by making a fresh application, it was not intended therein that a separate and fresh written application ought to be made. The converted *ex parte* application supported by fresh and further additional affidavits is the fresh application that was referred to in that case.

[5] Non-compliance with O. 29 rr. 1 and 2 in any case cannot affect jurisdiction. It must be so as non-compliance merely amounts to irregularity. Hence, even if the defendants are right, which they are not, a breach of the rules cannot result in the *ex parte* application being held as jurisdictionally spent.

[6] The conduct of the defendants have estopped them from raising this preliminary issue. By agreeing to have the *inter partes* application argued immediately after the setting aside of the *ex parte* injunction was given, the defendants have led the plaintiff to believe that there was no need to file a fresh application.

[Preliminary objection dismissed.]

Case(s) referred to:

Elias Mooin & Anor v. Dato' Zainal Abidin Johari [1997] 3 CLJ 455 ***(refd)***

Erinford Properties Ltd v. Cheshire County Council [1974] 2 All ER 448 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(refd)***

Kepong Industrial Park Sdn Bhd & Ors v. Teoh Seng Aun & Ors [1999] 4 CLJ 726 ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(refd)***

Lee Lim Huat v. Yusof Khan Ghows Khan & Anor [1997] 3 CLJ 197 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 29 rr. 1(2), (2B), 2(5), O. 92 r. 4

For the plaintiff - Malik Imtiaz (M Pala with him); M/s Salleh & Assoc

For the defendants - Dato' Dr Cyrus V Das (Elaine Ong & Rajesh Jethi with him); M/s Shook Lin & Bok

Reported by WA Sharif

JUDGMENT

RK Nathan J:

Facts

On 29 June 1999 by way of encl. 9 the plaintiff applied *ex parte* for various orders against the defendants in the nature of a Mareva injunction, Anton Piller Orders and Disclosure Orders. These *ex parte* orders were made by this court pursuant to O. 29 r. 1(2) of the Rules of the High Court 1980 (the RHC).

The plaintiff then served the order dated 29 June 1999 (encl. 14) upon the defendants on 30 June 1999. On 2 July 1999 the defendants made an oral application *inter partes* to vary encl. 14 to enable the 1st defendant to carry out his daily business transactions. Whilst disputing the service of the papers the 1st defendant argued that the *ex parte* orders granted were too wide as to completely bring the daily business of the defendants to a halt. After hearing submissions I varied my *ex parte* orders (encl. 14) by my order dated 2 July 1999 (encl. 19). On 7 July 1999 the defendants applied (encl. 25) to set aside the *ex parte* injunction before the expiry of the 14-day requirement. Pending the disposal of encl. 25 I granted a holding over order on an *inter partes* basis.

The plaintiff did not file a separate application for an *inter partes* injunction upon the lapse of the *ex parte* injunction at the end of the 14 days. On 28 September 1999 after hearing extensive arguments I set aside the *ex parte* orders and gave an order in terms of encl. 25. The plaintiff, seeking a fresh injunction, relied on encl. 9 which was the *ex parte* application already disposed of.

Case For The Plaintiff

The plaintiff contended that it was still open to it to have encl. 9 heard *inter partes* this time, for an injunction on the same terms as encl. 14. The defendants' case was that encl. 9 is jurisdictionally spent. They also argued that as a matter of procedural law and as a construction of O. 29 rr. 1 and 2 of the RHC, there must be a separate application made *inter partes* by the plaintiff for any further injunction in the same proceedings.

Issue Before The Court

The issue before the court was whether it is open to the plaintiff to rely on encl. 9 to obtain an injunction on an *inter partes* basis after the *ex parte* order given, based on encl. 9 had been set aside.

The defendants raised a preliminary objection which I heard on 2 November 1999 and dismissed with costs on 3 November 1999. The defendants have since appealed against the said dismissal.

Findings Of The Court

Is Enclosure 9 Jurisdictionally Spent?

It is the defence case that as a matter of procedural law and pursuant to O. 29 rr. 1 and 2 of the RHC there must be a separate application made *inter partes* by the plaintiff for any further injunction in the same proceedings. It is necessary to therefore reproduce O. 29 rr. 1 and 2 which read as follows:

> 1. Application for injunction (O. 29 r. 1)
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> (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.
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> (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made *ex parte* by summons supported by an affidavit but, except as aforesaid, such application must be made by summons.
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> 2. Detention, preservation, etc of subject-matter of cause or matter (O. 29 r. 2).
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> (1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

The defendants pointed out that at all material times the only pending application before the court was encl. 25 which was the defendants' application to set aside the *ex parte* order, since there was no separate application by the plaintiff for an *inter partes* injunction upon the lapse of the *ex parte* injunction at the end of the 14 days. It is the case of the defendants that encl. 9 (the *ex parte* application) is now a spent force because the order that was sought under that application has been drawn up, sealed and even enforced. The defendants emphasised that encl. 9 was specifically made under O. 29 r. 1(2).

It is trite that after *Elias bin Mooin & Anor v. Dato' Zainal Abidin bin Johari* [1997] 3 CLJ 455; [1997] 5 MLJ 359 any doubt or ambiguity as to the life span of an *ex parte* order was put right, the court holding that O. 29 r. 1(2B) of the RHC clearly specifies a life span for the *ex parte* injunction and does not contemplate an "unless otherwise extended" order. Order 29 r. 1(2B) reads as follows:

> 1. Application for injunction (O. 29 r. 1)
>
> ...
>
> (2B) Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of two weeks from the date on which it is granted.

The Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193 observed that under r. 1(2B) the interim injunction automatically lapses and there is thus a need for the plaintiff to reapply for the interim injunction. Again the Court of Appeal in *Lee Lim Huat v. Yusof Khan bin Ghows Khan & Anor* [1997] 3 CLJ 197; [1997] 2 MLJ 472 emphasised the importance of determining whether the injunction applied for was meant to be an *ex parte* or an *inter partes* injunction by emphasising that r. 1(2B) would have no relevance to an *inter partes* application. It is now accepted as set law that O 29 r 1(2B) is a mandatory provision and that the *ex parte* injunction automatically lapses at the end of 14 days "unless sooner revoked or set aside". I have also said in *Kepong Industrial Park Sdn Bhd & 3 Ors v. Teoh Seng Aun & 2 Ors* [1999] 4 CLJ 726; [1999] 3 AMR 2814, after considering the effect of O. 29 r. 1(2B) at p. 2819 that "any further injunction will have to be obtained by making a fresh application heard *inter partes*".

Based on all these views the defendants argued that there must be a separate *inter partes* application that must be made. I must also remind myself that in *Keet Gerald* the Court of Appeal said at p. 213 that "there is need for the appellant to reapply for the interim injunction".

The defendants advocated that the remedy of the plaintiff must be to appeal against the decision setting aside the *ex parte* order and to apply for an Erinford type of injunction, that is to seek a restorative injunction pending the appeal (see *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 448). The defendants contended that having refused the injunction by setting it aside I ought not to revisit my order and review, on the same materials as they stood. I must hasten to point out that when I granted the *ex parte* order on 29 June 1999, I had directed that the *inter partes* hearing of the application be heard on 12 July 1999, that is, well within the 14-day period. Since the said *ex parte* order (encl. 14) was served on the defendants on 30 June 1999 the defendants' solicitors appeared before me together with the plaintiff's solicitors on 2 July 1999 to vary the *ex parte* order. Having varied the order I then vacated the earlier *inter partes* hearing date of 12 July 1999 and fixed the hearing of encl. 9 as *inter partes* to 9 July 1999.

On 9 July 1999 counsel for both parties were present and informed me that there were three enclosures for hearing, namely, encl. 9, encl. 16 and encl. 38. Enclosure 9 was the *inter partes* application of the plaintiff for the injunction. Enclosure 38 was the plaintiff's application for leave to commit the 1st defendant and/or various directors of the 1st defendant to prison for breaching the *ex parte* order. Enclosure 16 was the 2nd defendant's application for leave to enter conditional appearance and to strike out the writ and claim filed against the 2nd defendant.

By consent both parties agreed that notwithstanding the earlier three enclosures, I ought to hear arguments as to whether encl. 38 ought to be heard before I heard the defendants' application to set aside the injunction (encl. 25). After hearing full arguments from both parties I decided to hear encl. 25. As the submissions were taken together I gave an order in terms of encl. 25 and set aside the *ex parte* order and fixed the hearing of the *inter partes* application. Hence, this preliminary objection.

I take the view that once the court has on its own motion granted an *inter partes* hearing date well before the expiry of the 14-day period, it means that notwithstanding the fact that the *ex parte* order would automatically expire after the 14 days or notwithstanding the fact that the said order could be set aside, the *inter partes* hearing must go on on the date fixed or as extended. After all the *ex parte* order stands only on the affidavit

filed in support, whereas on the *inter partes* hearing date both sides would have filed their respective affidavits and the court will have the benefit of details and explanations not necessarily contained in the affidavit in support of the *ex parte* application.

It can be argued as in this case by the defendants that once the application to set aside the order is fully heard, then the necessary affidavits are already there for the court's consideration. Whilst this may be so, it need not necessarily be so because parties may wish to hold back certain issues at the striking off stage due to relevancy and may wish to include those issues at the *inter partes* injunction stage always bearing in mind the need for full and frank disclosures. In any case O. 92 r. 4 of the RHC provides that the court has an inherent jurisdiction to regulate its own affairs and the manner in which these affairs are regulated. To my mind if the submission that the application itself is jurisdictionally spent is to be accepted, it means that the plaintiff would have to merely refile and reserve the same application to make it *inter partes.* This clearly is not what the law intends, that is, to make matters difficult for litigants. The purpose is achieved by converting the *ex parte* application into an *inter partes* application by the court breathing life into it by giving the *inter partes* date.

The defendants rely on O. 29 r. 1(2) and the numerous cases earlier referred to. However, none of these cases nor does O. 29 r. 1(2) say that a separate written application ought to be made. Whilst even I have held in *Kepong Industrial Park* that a further injunction would have to be obtained by making a fresh application, I did not intend that a separate and fresh written application ought to have been made. The converted *ex parte* application supported by fresh and further additional affidavits is the fresh application that I was referring to. Of course it is up to the plaintiff if it so intends, to file a fresh application. All that is important to note is that pursuant to O. 29 r. 2(5) read together with O. 29 r. 1(2), the court must be moved by summons, not a separate summons. The rules would have said so, if this was what was intended.

In any case, assuming, argumendo that the defendants are is right that a separate application must be filed (which I have held is not the correct view), then the question arises, does non-compliance with the provisions of O. 29 rr. 1 and 2 affect jurisdiction. I hold that it cannot because non-compliance merely amounts to irregularity (see O. 92 r. 4 of the RHC). In *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565 the Federal Court, in a case where the appeal involved an issue as to whether a judgment in default had been obtained in compliance with the rules, said at p. 578 as follows:

> Any proceeding commenced, or any order or judgment obtained, in breach of a rule of court is always subject to the curative power of the court available under O. 2 r. 1 of the Rules of the High Court 1980 ('the RHC'). Whether a particular proceeding should be cured is, of course, a matter of discretion for the court whose assistance is prayed in aid to effect the cure. It is wrong to assume that the court is obliged in every case to overlook the breach of a rule of court. For that would mean that a litigant may honour the Rules of the High Court more by breach rather than by observance. This is certainly not the law.
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> The proper approach is for a court to accept that a breach of a rule of court renders the particular proceeding irregular with a power in the court to excuse the non-compliance.

In the circumstances, even if the defendants are right, which I have held they are not, a breach of the rules cannot result in the *ex parte* application being held as jurisdictionally spent.

Estoppel

I also hold that the conduct of the defendants have estopped them from raising this preliminary issue. It is a fact that during the submissions made by both parties as to whether I ought to hear encl. 25 first or the application for contempt, it was agreed that in the event encl. 25 was set aside, the hearing of the *inter partes* application was to be proceeded with and that this was indeed to have been proceeded with on the day the decision was to be delivered. Now surely the parties must have intended that since the hearing date for the *inter partes* hearing had been given on the *ex parte* application itself, it was this very same converted *ex parte* application that would be heard and not a freshly filed application because there was no such freshly filed application in the court file. To my mind, the Federal Court's decision in *Lai Yoke Ngan (supra)* is clear authority for the proposition that by agreeing to have the *inter partes* application argued immediately after the setting aside of the *ex parte* order was given, the defendants have by their conduct led the plaintiff to believe that there was no need to file a fresh application. If the defendants had raised even a query at that stage, the plaintiff could have filed a separate *inter partes* application, even upon a certificate of urgency in order to be in a position to argue the *inter partes* application as soon as I had given my decision on encl. 25 which was the defendant's application to set aside the e*x parte* order. I therefore dismissed the preliminary objections with costs.